LIBRARY
SUPREME COURT

Office Supreme Court, U.S.
FILED
AUG 21 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 427

R. H. WRIGHT, INC.,
Petitioner,

vs.

HARDRIVES CO., INC., and MONTGOMERY-BARNETT CONSTRUCTION CORP.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

SHUTTS, BOWEN, SIMMONS, PREVATT, BOUREAU & WHITE,
1010 First National Bank Building,
Miami 32, Florida,

ANDERSON & NADEAU,
1126 First National Bank Building,
Miami 32, Florida,
Attorneys for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Petition for Writ of Certiorari 1

I. The Local Purchase of Imported Bitumen Subsequent to Its Processing and Storage Does Not Constitute a Transaction in Interstate Commerce or Foreign Commerce 5

(a) The Fact That a Person Is Subject to the Provisions of the Fair Labor Standards Act Does Not Bring His Activities Within the Ambit of the Sherman Anti-Trust Act 5

(b) The Storage and Processing by the Importing Oil Company of the Bitumen Which Went into the Making of Hot Mix Asphalt Did Not Constitute a "Convenient Step" 7

(c) Whether the Circumstances under Which the Shipments Here Were Made Are Such As Nearly to Equate Shipments in Response to an Order 8

II. The Determination of the Court of Appeals That the Involved Transaction Was in Interstate Commerce Deprived the Petitioner of Its Right to a Trial by Jury Guaranteed by Amendment VII, United States Constitution 10

Conclusion 11

Appendix A—Opinion of the United States Court of Appeals for the Fifth Circuit A1

Appendix B—Title 15, U.S.C.—Commerce and Trade, § 1 ..... A7

TABLE OF CASES

A. L. A. Schechter Poultry Corporation v. *United States*, 295 U.S. 495, 543 (1935) 8

Barbe v. *Cummins Const. Corporation*, (C.A. 4th, 1943) 138 F.2d 667 7

Daly v. *Cetr*, (D.C. E.D. Mich., 1943) 53 F. Supp. 876 ... 7

Emulsified Asphalt Products Company v. *Mitchell*, (C.A. 6th, 1955) 222 F.2d 913 ... 7

Ewing-Von Allman Dairy Co. v. *C. and C. Ice Cream Co.*, (C.A. 6th, 1940) 109 F.2d 898 ... 8

Gerdert v. *Certified Poultry & Egg Co.*, (D.C. S.D. Fla., 1941) 38 F. Supp. 965 ... 7

Higgins v. *Carr Bros. Co.*, 317 U.S. 572 (1943) ... 7

Jax Beer Co. v. *Redfern*, (C.A. 5th, 1941) 124 F.2d 172 7

Kirschbaum Co. v. *Walling*, 316 U.S. 517, 520 (1942) ... 7

Marks Food Corporation v. *Barbara Ann Baking Co.*, (C.A. 9th, 1959) 274 F.2d 934 ... 5, 10

Walling v. *Jacksonville Paper Co.*, 317 U.S. 564 (1943) 5, 7

TEXTS AND STATUTES

Barron & Holtzoff 2B, Sec. 1131, p. 513 ... 9

15 U.S.C. 1 ... 2, 6, A7

29 U.S.C. 202 ... 6

29 U.S.C. 203 (b) ... 6

29 U.S.C. 206 (2) ... 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

R. H. WRIGHT, INC.,
Petitioner

vs.

HARDRIVES CO., INC., and MONTGOMERY-BARNETT CONSTRUCTION CORP.,
Respondents

PETITION FOR WRIT OF CERTIORARI

R. H. WRIGHT, INC., a Florida corporation, petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing the judgment of the United States District Court for the Southern District of Florida. The opinion of the Court of Appeals is appended hereto and is reported in 329 F.2d 868.

The judgment of the Court of Appeals was dated March 26, 1964. A petition for rehearing, timely filed, was denied on June 10, 1964, and the issuance of a mandate was stayed for ninety days in order to permit petitioner to apply for certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

There are two questions presented for review: 1) whether the subsequent resale of imported bitumen, which has been locally stored and processed, to local asphalt producers constitutes a transaction in interstate or foreign commerce within the scope of Ch. 647, 26 Stat. 209, 15 U.S.C., § 1, and 2) Whether under the U. S. Const., Amend. VII, the defendant in an anti-trust suit is entitled to have the question as to the interstate or foreign-commerce character of the transaction determined by a jury.

The statute which the case involves is set forth in the appendix.

By an amendment to an amended complaint brought by *Hardrives, Inc., et al.* (R. 25, 29) it was alleged that R. H. Wright, Inc., East Coast Asphalt Corp. and South Florida Asphalt, Inc., collectively possessed market control of the production and distribution of hot mix asphalt in Broward County, Florida. It was charged that hot mix asphalt was a manufactured product consisting of locally obtained materials and imported bitumen, a petroleum product. It was charged that the defendants, by collusion and agreement with one another, had fixed the price of hot mix asphalt sold by them and that this had resulted in a monopoly of the sale and marketing of the product. It was also charged that the agreement contemplated the division of the market and the policing of the area by R. H. Wright, Inc., to enforce compliance with the agreement (R. 26, 30, 31, 33).

The amendment to the amended complaint alleged that the principal use for the hot mix asphalt was in the paving of highways, streets, roads, parking lots, etc. and that these streets, through interconnections, carried traffic which

originated beyond the State of Florida; that the cost of the highways was borne by interstate users since they were paid for, in part, from revenues generated from the tax imposed on gasoline; that the equipment used by the producers of hot mix asphalt was imported into the State of Florida; that the equipment used for laying hot mix asphalt was imported into the State of Florida; and finally that the Wage and Hours Division of the Department of Commerce had determined that the plaintiffs (sic) engaged in the paving of such highways were subject to the provisions of the Fair Labor Standards Act (R. 39, 40).

R. H. Wright, Inc., answered the complaint, generally denying the material allegations thereof (R. 80) and then moved for summary judgment (R. 95, 98).

Thereafter the Court entered an order setting the cause for trial. The order recited that the question as to whether the transactions described in the complaint involved interstate commerce was primarily a question of law for the Court to determine. Accordingly the cause was set for trial on such question without the intervention of a jury, with leave to the parties to take depositions, as well as to produce oral testimony before the Court at the appointed time (R. 120).

Upon such trial, the Court entered an order in which it recited that the Court having considered the testimony of the parties taken in open Court (no evidence having been offered by the defendants) together with certain depositions, found that the ingredients alleged to have been shipped in interstate commerce and used in the manufacture of hot mix asphalt came to rest in Port Everglades in the hands of the importing oil companies and was by them delivered to the asphalt processing company to be mixed according to State and other formulae and then stored in tanks designed to hold the processed bitumen until resale

to sundry users. Accordingly the Court determined that the interstate character of these ingredients was lost prior to their purchase by the defendants and that their subsequent use was not in the flow of interstate or foreign commerce (R. 204). The Court thereupon granted the motion for summary judgment of R. H. Wright, Inc. and the motion *ore tenus* of the other defendants and dismissed the complaint (R. 205).

The Court of Appeals reversed this judgment saying in part:

> "Although some of the early cases did require a continued uninterrupted flow of the commodity in question, from the time of its entry into the state until its ultimate consumption, in order to be 'in commerce', we read the later cases to have modified this rule. In Walling v. Jacksonville Paper Co., 317 U.S. 564, 87 L. Ed. 460 (1943), the Supreme Court in referring to the meaning of 'in commerce' as used in the Fair Labor Standards Act, said:
>
> > 'The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the act . . . if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destination, they remain "in commerce".'"

The Court also said:

> "This concept of a continued 'in commerce character' in spite of a halt at a warehouse or storage facilities seems to have been more readily adopted in cases involving a shipment in response to a special order. However, where the circumstances under which the shipment was made are such as to nearly equate shipment in response to an order, the courts have also held that the temporary halt did not break the chain of commerce * * *"

In its opinion the Court rendered judgment with respect to the issue of interstate commerce, but remanded the cause for trial on the issue of price fixing and other alleged violations of the Act and damages claimed.

The reasons why the writ should be granted are 1) that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, viz. that the Fair Labor Standards Act is *in pari materia* with the Sherman Anti-Trust Act; 2) that the decision of the lower court that the holding, as a matter of fact, was a transaction in interstate commerce is contrary to the decision in *Marks Food Corporation* v. *Barbara Ann Baking Co.*, (C.A. 9th, 1959) 274 F.2d 934.

I.

THE LOCAL PURCHASE OF IMPORTED BITUMEN SUBSEQUENT TO ITS PROCESSING AND STORAGE DOES NOT CONSTITUTE A TRANSACTION IN INTERSTATE COMMERCE OR FOREIGN COMMERCE.

The lower Court apparently decided that the transaction was in interstate or foreign commerce because the defendants were allegedly subject to the provisions of the Fair Labor Standards Act and because the bitumen was imported in response to a prior order.

(a) The Fact That a Person Is Subject to the Provisions of the Fair Labor Standards Act Does Not Bring His Activities Within the Ambit of the Sherman Anti-Trust Act.

The Court below placed its chief reliance on this aspect of the case upon this Court's decision in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 (1943).

The Acts under consideration are substantially different. The Sherman Act (15 U.S.C. 1) provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

The Wage and Hours Law (29 U.S.C. 203 (b)) provides that:

> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several states or between any state and any place outside thereof."

Section 206 (2) of the same title provides that:

> "(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *."

Section 202. Congressional finding and declaration of policy further emphasizes the differences.

> "(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

The complaint here is for a violation of the Sherman Act. The defendants below were not charged with violating the Wage and Hours Law.

That the decisions under the Fair Labor Standards Act are not helpful in Sherman Act cases have been recognized. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 520 (1942); *Gerdert* v. *Certified Poultry & Egg Co.*, (D.C. S.D. Fla., 1941) 38 F. Supp. 965.

Emulsified Asphalt Products Company v. *Mitchell*, (C.A. 6th, 1955) 222 F.2d 913; *Barbe* v. *Cummins Const. Corporation*, (C.A. 4th, 1943) 138 F.2d 667; *Higgins* v. *Carr Bros. Co.*, 317 U.S. 572 (1943); *Jax Beer Co.* v. *Redfern* (C.A. 5th, 1941) 124 F.2d 172; *Daly* v. *Cetr*, (D.C. E.D. Mich., 1943) 53 F. Supp. 876.

(b) The Storage and Processing by the Importing Oil Company of the Bitumen Which Went into the Making of Hot Mix Asphalt Did Not Constitute a "Convenient Step."

The lower Court's holding that there was a temporary storage in the Trumbell tanks is contrary to the finding by the District Court. That Court found that there was a complete stop in the interstate shipment. This destroys the basis for the argument regarding the "convenient step" theory. The bitumen that came in oceangoing tankers was put into separate tanks, blended into other tanks, submitted to the State Road Department for its approval and sales were withheld pending receipt of certification as to compliance with standards.

The bitumen was not ordered by the petitioner, who was charged with the violation, but it was shipped into Port Everglades upon the order of the oil companies and

was there stored awaiting such time as purchases were to be made by the asphalt manufacturers. There were no sale contracts involved and the asphalt manufacturers simply ordered bitumen from the oil companies as was required by their needs. Upon the order being placed, the bitumen was sold by the oil companies and delivered to the particular asphalt manufacturer. Following delivery the bitumen was mixed with aggregates and otherwise subjected to a manufacturing process by the purchaser. The finished product was then sold to any contractor who might care to order for his own use.

In *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, 543 (1935), Chief Justice Hughes said:

> "The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use."

See also *Ewing-Von Allman Dairy Co.* v. *C. and C. Ice Cream Co.*, (C.A. 6th, 1940) 109 F.2d 898.

(c) Whether the Circumstances under Which the Shipments Here Were Made Are Such As Nearly to Equate Shipments in Response to an Order.

It should be a sufficient answer to this question that the complaint did not allege that the shipment of the material was initiated by prior order. The Respondent's brief in the Court of Appeals, so admitted (p. 9).

The facts concerning the method of importing, processing, storing and the subsequent reselling of bitumen to local hot mix asphalt producers was thoroughly gone into by the trial court and its judgment was based both upon the depositions and the testimony taken before the Court.

This judgment went to the Court of Appeals clothed with a presumption of its correctness. Barron & Holtzoff 2B, Sec. 1131, p. 513.

While the judgment with respect to the other defendants was obviously correct, it was even more so with respect to R. H. Wright, Inc. This is so because the petitioner stands in a different position regarding this point than did the other defendants in the trial court. The company chiefly engaged in the importation of bitumen into Port Everglades was the Shell Oil Company. R. H. Wright did not purchase from Shell, but bought from American Oil Company, which had an arrangement with Shell by which Shell would allow American, which had no storage facilities in Port Everglades, to sell up to 20,000 tons of bitumen a year from Shell's storage facilities in exchange for a like privilege to Shell to buy from American at other places. Title to the bitumen sold by American in Port Everglades actually did not pass from Shell to American until it was drawn from the storage by common carriers who, in turn, delivered it to R. H. Wright and others. The Court below, however, brushed this contention aside saying that it was "a mere bookkeeping distinction." "Bookkeeping distinctions" can sometimes become very important in income tax cases

II.

THE DETERMINATION OF THE COURT OF APPEALS THAT THE INVOLVED TRANSACTION WAS IN INTERSTATE COMMERCE DEPRIVED THE PETITIONER OF ITS RIGHT TO A TRIAL BY JURY GUARANTEED BY AMENDMENT VII, UNITED STATES CONSTITUTION.

The District Court granted the motion of R. H. Wright, Inc., for a summary judgment based upon the undisputed testimony as reflected by depositions and testimony. The Court of Appeals reversed this order and found, as a fact, that the transaction was in interstate commerce. This decision was directly in conflict with the opinion in *Marks Food Corporation* v. *Barbara Ann Baking Co., supra.* In this case the Court said (936):

> "Mr. Justice Black in Beacon Theatres, Inc., v. Westover, 359 U.S. at pages 500, 501, 79 S. Ct. at page 952 says, 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care,' quoting from Dimick v. Schiedt, 293 U.S. 474-486, 55 S. Ct. 296, 79 L. Ed. 603. See Byrd v. Blue Ridge Elec. Co-op., 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953. The trial judge in our case was of the opinion and found from the written stipulation and concession by plaintiffs that defendants were not in interstate commerce and that (we quote from his opinion) 'In the case at bar, after a full hearing on the question of the interstate commerce phase of the case, we are of the opinion that plaintiffs have failed to establish defendants' business of producing and marketing bread is in or directly affects trade and commerce among the several states as alleged in the complaint.' Thus the court took from the jury the determination of the basic issue in

the case. We hold that the judgment must be reversed because of the court's assumption of the jury's prerogative."

CONCLUSION

The judgment should be quashed.

Respectfully submitted,

.....

RICHARD M. WHITE,

.....

THOMAS H. ANDERSON,

SHUTTS, BOWEN, SIMMONS, PREVATT,
BOUREAU & WHITE,
1010 First National Bank Building,
Miami 32, Florida,
ANDERSON & NADEAU,
1126 First National Bank Building,
Miami 32, Florida,
Attorneys for Petitioner.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19864

HARDRIVES CO., INC. and MONTGOMERY-BARNETT CONSTRUCTION CORP.,
Appellants,

versus

EAST COAST ASPHALT CORP., R. H. WRIGHT, INC., and SOUTH FLORIDA ASPHALT, INC.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.
(March 26, 1964.)

Before TUTTLE, Chief Judge, and WISDOM and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: The appellants, two Florida paving contractors and users of "hot mix asphalt", brought this action against the defendants, three Florida companies engaged in the business of manufacturing and selling "hot mix asphalt" and other paving materials, seeking an injunction and treble demages under the Sherman and Clayton Acts, Title 15, U.S.C.A. §§ 15 and 26. This is a related case to *United States* v. *South Florida Asphalt Company, et al.*, No. 19,635, decided this same date, 5 Cir., ...

F.2d . . . . The complaint here alleges the same combination and conspiracy in restraint of trade in a civil action that is the subject of the criminal information at issue in the *South Florida* case.

Among other things, it is alleged that the business of each of the parties and the activities of each in such business is within and directly affects interstate commerce; that the defendants in furtherance of a combination, conspiracy and agreement have "fixed" the prices on "hot mix asphalt" sold by them to the appellants; and have divided the market for sales of hot mix asphalt amongst themselves, all to the damage of appellants and in violation of the Sherman Antitrust Act. The complaint further alleged that one of the components used by the defendants in the manufacture of not mix asphalt is bitumen, a petroleum product shipped into Florida from Venezuela and other places outside of Florida; that the hot mix asphalt sold by the defendants is used by the appellants in the paving of streets, highways and roads which inter-connect with highways leading to states outside of Florida, and which are used in interstate travel.

The court conducted a hearing on the jurisdictional question of whether or not the transactions involved interstate commerce within the meaning of the Sherman Act after which he entered a final judgment dismissing the complaint with prejudice. The court stated in his findings of fact that "the ingredients alleged to have been shipped in interstate commerce . . . came to rest", and "the interstate character of those ingredients was lost prior to their purchase by the defendants." "Also jurisdiction does not attach even if it should be assumed that hot mix asphalt . . . was at some stage subsequent to its sale by the importer, applied as topping on roads that were a pattern of

the system of interstate highways in Florida and elsewhere."

The following facts were brought out at the hearing. Shell Oil Company ships bitumen into Florida from Venezuela and elsewhere in ocean-going tankers. The bitumen is discharged into tanks owned by a third party at Port Everglades where it is, (1) blended to meet certain viscosity specifications set by the state; and (2) stored until sold to users such as the appellants here. From the time it leaves the foreign port until the time it is applied to the roads, including the time it is in transit and the storage period in the Port Everglades tanks, the bitumen is kept hot and in a liquid or "flow" state. Shell Oil, the importer, continues to own the bitumen while it is in the storage tanks at Port Everglades up until the time that sale and delivery is made to the appellants. Ocean tankers replenish the storage tanks at intervals approximating one month.

Although some of the early cases did require a continued uninterrupted flow of the commodity in question, from the time of its entry into the state until its ultimate consumption, in order to be "in commerce", we read the later cases to have modified this rule. In *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 87 L. Ed. 460 (1943), the Supreme Court in referring to the meaning of "in commerce" as used in the Fair Labor Standards Act, said:

> "The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the act . . . if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destination, they remain 'in commerce'."

In *Pevely Dairy Co.* v. *United States,* 8 Cir., 1949, 178 F.2d 363, in response to the contention that an interruption in the flow had taken away the "in commerce" nature of the commodity, the court said:

> "... It was the expectation of both the producers and the handlers that the milk would be shipped in interstate commerce and we are of the view that the fluid milk thus shipped in interstate commerce remained in that commerce until it reached the ultimate consumers."

See also *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219.

This concept of a continued "in commerce character" in spite of a halt at a warehouse or storage facilities seems to have been more readily adopted in cases involving a shipment in response to a special order. However, where the circumstances under which the shipment was made are such as to nearly equate shipment in response to an order, the courts have also held that the temporary halt did not break the chain of commerce. In *Standard Oil Co.* v. *F.T.C.*, 7 Cir., 173 F.2d 213, the court stated:

> "Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioners customer's demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting [Indiana] to Detroit [Michigan]."

See also *United States* v. *General Motors*, 7 Cir., 121 F.2d 376.

Justice Holmes initiated this realistic approach to the problem of what is "in commerce" in *Swift & Co.* v. *United States*, 196 U.S. 375, when he recognized that "commerce among the states is not a technical legal conception, but a

practical one, drawn from the course of business." Since that time the majority of the cases have looked to the ultimate disposition of the product contemplated by the parties involved prior to the "halt" in the flow. *Northern Cal. Pharmaceutical Assoc.* v. *United States,* 9 Cir. 1962, 306 F.2d 379; and *Pevely Dairy Co.* v. *United States, supra.* In the present case, all the parties contemplated that the bitumen—or at least a substantial portion of it—would ultimately wind up as topping on the roads and streets of Florida.

Defendant Wright contends that it stands in a different position from the other defendants in that it purchased bitumen from American Oil and not from Shell Oil, the importer. American and Shell had an arrangement whereby Shell would allow American, who had no storage facilities at Port Everglades, to sell up to 20,000 tons of bitumen per year from Shell's storage facilities there in exchange for American allowing Shell the same privilege at other places. Title to the bitumen sold by American at Port Everglades was said to pass from Shell to American at the moment the bitumen was drawn from the storage and blending tanks into the carriers who were to deliver it to the users. At the very same instant, title passed from American to the purchasing user. We find nothing unlawful in the arrangement between Shell and American. The arrangement simply allowed the two companies to compete in areas where only one of them had port facilities. This course of dealing amounts to no more than a mere bookkeeping distinction insofar as a determination of the "in commerce" character of the bitumen is concerned. We hold that the bitumen purchased by the defendant Wright retained its "in commerce" character as well as that purchased directly from the importer by the other defendants.

Finally, the appellant Montgomery urges that:

> "6. The Court erred in dismissing the claim of Montgomery-Barnett Construction Corp. against South Florida Asphalt, Inc. in that, even if Montgomery-Barnett Construction Corp. did add the price increase to its sale price to customers, it is not barred from proving damages for loss of profit from loss of business."

As we read the record, Montgomery's claim was not dismissed, although the District Court did enter a partial summary judgment against Appellant Montgomery, stating "there is no genuine issue as to the absence of said plaintiff's damages . . . the alleged over charges in the sum of $23,661.02 were passed on to plaintiff's customers . . . and as to that part of its claim it is ordered and adjudged that the Plaintiff . . . take nothing by this lawsuit. As to the other damages claimed by the Plaintiff, the Defendant's motion is denied at this time. . . ." Had the case ever gotten to the issue of damages, Montgomery would have been free to prove damages for loss of profit from the loss of business.

Accordingly, the judgment is REVERSED and RENDERED with respect to the issue of interstate commerce, and REMANDED for trial on the issues of price fixing, other alleged violations of the act, and damages claimed.

APPENDIX B

Title 15, U.S.C.—Commerce and Trade, § 1.

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer of distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combina-

tion or conspirary declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, §1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282.)"